Supreme Court, U.S.
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No. 95-1280

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BI-STATE DEVELOPMENT AGENCY OF THE MISSOURI-ILLINOIS METROPOLITAN DISTRICT,
Petitioner,

v.

ABBOTT AMBULANCE, INC.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court and Court of Appeals correctly determined that there is no private right of action to recover past remediation costs under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a).

2. Whether RCRA's jurisdictional requirement that a site present "an imminent and substantial endangerment to health or the environment," 42 U.S.C. § 6972(a)(1)(B), can be met where the site was completely remediated prior to suit.

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Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6972(a) .....*passim*

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, Bi-State Development Authority of the Missouri-Illinois Metropolitan District ("Bi-State"), exercising its power of eminent domain, filed an action in the Circuit Court for the City of St. Louis in February 1991 to condemn property owned by Respondent, Abbott Ambulance, Inc. ("Abbott"). While the condemnation litigation was pending, Bi-State admittedly completed a remediation of the site by removing underground storage tanks and soil contaminated with petroleum. In the condemnation litigation, Bi-State claimed that Abbott's con-

demnation award should be reduced to reflect the impact of the alleged contamination and Bi-State's remediation costs. The parties subsequently settled, and the condemnation litigation was dismissed with prejudice.

Having had its day in state court, Bi-State attempted, by recasting the dispute in federal court as a RCRA claim with eight pendent state law claims, to relitigate its entitlement to recover from Abbott the same alleged remediation costs at issue in the condemnation proceeding. Abbott moved to dismiss the RCRA claim on two grounds: First, there is no private right of action under RCRA to recover past remediation costs; second, since Bi-State alleged it had completely remediated the site, RCRA's jurisdictional requirement could not be met because the site did not present "an imminent and substantial endangerment to health or the environment," as required by 42 U.S.C. § 6972(a)(1)(B).

The district court dismissed the RCRA claim, finding that it "does not have jurisdiction over a 'citizen's suit' seeking restitution pursuant to 42 U.S.C. §6792(a)," and declined to exercise supplemental jurisdiction over the remaining claims. Notably, in granting the motion to dismiss, the district court explicitly refused to follow the Ninth Circuit's decision in *Meghrig v. KFC Western, Inc.*, 49 F.3d 518 (9th Cir. 1995), *cert. granted*, 516 U.S. ___ (No. 95-83, September 27, 1985), which is now under submission to this Court. On appeal by Bi-State, the Eighth Circuit summarily affirmed. The Court ruled that its previous holding in *Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995), *petition for cert. filed*, No. 95-1378 — that there is no implied private right of action under RCRA to recover past cleanup costs — was the law of the Circuit and was dispositive here.

REASONS FOR DENYING OR POSTPONING CONSIDERATION OF THE WRIT

The petition should be denied or consideration postponed because the identical issues recently were briefed and argued to this Court in *Meghrig*, No. 95-83 (oral argument held January 10, 1996). In addition to the briefs of the parties in that case, amicus briefs were filed by the United States, various states' attorneys general (including the Missouri Attorney General), a variety of petroleum marketing groups, and Bi-State, the petitioner in this case. Since these issues already have been exhaustively addressed in this Court, there is no reason for the Court to accord independent consideration to this petition because the Court's ruling in *Meghrig* will be dispositive here.

Bi-State concedes that *Meghrig* "raises the identical issue of whether restitution is an available remedy under RCRA's citizen suit provision." (Pet. 20.) Bi-State also acknowledges that *Meghrig* involves the additional question whether the RCRA jurisdictional requirement that there be an imminent and substantial threat to health or the environment can be met when the cleanup has already been completed. (Pet. 7.)

Bi-State incorrectly asserts, however, that this case and *Meghrig* are different because the imminent and substantial threat requirement is not at issue here. (Pet. 7, 20 n.6.) On the contrary, Abbott's motion to dismiss asserted as a separate ground for dismissal that there was no imminent and substantial threat because Bi-State's Amended Complaint alleged that the cleanup was complete. (Amended Complaint ¶¶ 22, 82-83; Motion to Dismiss at 2-3.) Abbott also raised this argument in the Eighth Circuit (Brief for Appellee at iii), but that court did not reach it because of its resolution of the private-right-of-action issue.

Thus, if this Court reverses *Meghrig* and holds *either* that there is no private right of action under RCRA to recover past remediation costs *or* that there is no jurisdiction under RCRA because

there can be no imminent and substantial threat to human health or the environment when the cleanup has already occurred, the Eighth Circuit's disposition of this case will have been vindicated and certiorari should be denied. If *Meghrig* is resolved on the merits in some other fashion, then this case should probably be remanded for reconsideration in light of that ruling. If for some reason *Meghrig* is not decided on the merits and the Court wishes to decide the RCRA issues, the Court should grant certiorari in *Furrer* rather than in this smaller case involving two not-for-profit organizations. As Bi-State acknowledges, *Furrer* presents the same issue as *Meghrig* and this case, and a petition for certiorari was filed in *Furrer* one month earlier than Bi-State's (Pet. 20). Moreover, the Eighth Circuit's opinion in *Furrer* was the basis for that court's summary affirmance in the present case.

Bi-State requests the Court to postpone consideration of this Petition pending the Court's disposition of *Meghrig*, and Abbott has no objection if the Court so chooses. But there is no basis for Bi-State's suggestion that this case should be consolidated with *Meghrig*, which has already been fully briefed and argued.

CONCLUSION

The petition for certiorari should be denied; alternatively, consideration should be postponed because the identical issues have already been briefed and argued to this Court in *Meghrig*, and the Court's decision in that case will govern the disposition of the Petition in this case.

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